Comparative law and legal culture: Placing vicarious liability in comparative perspective

1. Introduction

The term "vicarious liability" is a curious one. The word "vicarious" is defined in the Oxford English Dictionary as "acting or done for another", from the Latin *vicarius* meaning substitute.[1] Pollock claims to have invented the term "vicarious liability" in the 1880s,[2] but its roots lie far earlier, for example, it can be traced to early medieval ideas of identification of a master with the acts of its servants, and the personal liability of the Roman *paterfamilias* for the delicts of his child or slave. For Chief Justice Holt in 1691, it was already clear that "for whoever employs another is answerable for him and undertakes for his care to all that make use of him."[3] For the drafters of the French Civil Code in 1804, it was also obvious that "Masters and employers [are liable] for the damage occasioned by their servants and employees in the exercise of the functions in which they are employed."[4] While French law prefers the more inclusive (and simpler) term of "liability for the acts of others" (*responsabilité pour autrui*), the idea is nevertheless the same. In certain situations, one person will be held (strictly) liable for the torts of another. Instead of, or in addition to, suing the tortfeasor, then, the claimant can pursue another party for tortious damages. This other need not have been at fault, but is more likely to possess the funds to provide compensation. It is a doctrine which crosses legal systems and yet is at odds with the idea of fault-based liability which has traditionally dominated the law of torts.[5]

In this paper, I will explore vicarious liability from a comparative law perspective. Such a perspective, it will be argued, can provide an insight into both the operation of tort law principle, but also the values and policy objectives which underlie legal development. I will do so by examining its operation across a variety of legal cultures which may alternatively be described as: common/civil law; European/Australasian/Chinese; Western/Socialist; established/transitional – focussing on the law of England and Wales, Australia, Hong Kong, China and France. Two points of comparison will be made: (i) what legal structure exists and (ii) what policy goals underlie this legal structure? Studying comparative vicarious liability, it will be argued, helps us gain a clearer appreciation of the role private law plays in our societies in responding to economic development and the needs of personal injury victims.

---

[1] https://en.oxforddictionaries.com/definition/vicarious (accessed 7 August 2018).
[2] See O.W. Holmes, *Holmes-Pollock Letters* (CUP, 1941) vol I, p. 233.
[3] *Boson v Sandford* (1691) 2 Salk 440, 91 ER 382.
[4] Article 1384(5), now article 1242(5): modified by Ordonnance n°2016-131, 10 February 2016 - art. 2. Translation: https://www.legifrance.gouv.fr/Traductions/Liste-des-traductions-Legifrance (accessed 7 August 2018).
[5] See F. Werro and E. Büyüksagis, 'The boundaries between negligence and strict liability' in M. Bussani and A. J. Sebok (eds), *Comparative Tort Law: Global Perspectives* (Edward Elgar, 2015) 202; U. Magnus, 'Tort law in general' in J.M. Smits (ed), *Edward Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar, 2012) at 878. See also P. Widmer (ed), *Unification of Tort Law: Fault* (Kluwer, 2005). For the tensions vicarious liability causes to corrective justice and rights-based reasoning, see E.J. Weinrib, *The Idea of Private Law* (Harvard U Press, 1995) 186f; R. Stevens, *Torts and Rights* (OUP, 2007) Ch 11.

2. Placing vicarious liability in comparative perspective: The common law of England and Wales, Australia, Hong Kong.

The traditional common law definition of vicarious liability consists of three conditions: (1) an employer (or master) who is held strictly liable; (2) for the torts of his employee (or servant); (3) provided that they take place in the course of employment.[6] The classic test of Sir John Salmond, which was applied to claims across the common law world including former British colonies Australia and Hong Kong, states that:

> A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by his master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master.[7]

As the twentieth century progressed, it became clear that vicarious liability would have to change if it was to remain relevant to modern working practices. In 1951, Sir Otto Kahn-Freund observed that:

> In a mainly agricultural society and even in the earlier stages of the Industrial Revolution the master could be expected to be superior to the servant in the knowledge. Skill and experience which had to be brought to bear upon the choice and handling of the tools …. The technical and economic developments of all industrial societies have nullified these assumptions.[8]

Modern employment relations have thus forced the courts to review the traditional requirements for vicarious liability and, in particular, re-examine what we mean by the "employer/employee" relationship and the "course of employment" test.

2.1 Determining the employer/employee relationship

Blackstone in his *Commentaries on the Laws of England* (1765-1769) famously stated that "the master is answerable for the act of his servant, if done by his command, either expressly given, or implied."[9] The employment relationship was thus characterised as one where the master could control the servant's work and instruct the servant what work to undertake and how to do it. Bramwell LJ in *Yewens v Noakes* in 1880 agreed: "A servant is a person subject to the command of his master as to the manner in which he shall do the work".[10]

Such a view of the employment relationship did not survive the industrial revolution. As "masters" became large-scale employers and "servants" faceless employees, all three systems modified the test for the employment relationship to reflect changes in employment practices and, in particular, the rise of the skilled professional employee capable of working independently without constant supervision. Justice Michael Kirby in 1989 re-iterated the view expressed by Kahn-Freund above:

---

[6] Vicarious liability does extend to other relationships e.g. partners in a law firm, but the employer/employee relationship is the most common incidence of the doctrine. On this basis, it is this relationship which will be examined in this article.

[7] J. Salmond, *The Law of Torts* (1st ed, Stevens and Haynes 1907) 83 (later found in R. Heuston and R. Buckley, *Salmond and Heuston on the Law of Tort* (21st ed, Sweet and Maxwell 1996) 443).

[8] O. Kahn-Freund, 'Servants and independent contractors' (1951) 14 M.L.R. 504, 505-6.

[9] W. Blackstone, *Commentaries on the Law of England* (W. Morrison (ed), Cavendish, 2001) vol 1, 429.

[10] (1880) 6 Q.B.D. 530, 532-3.

… [t]he simple "control" test [is] no longer considered adequate to determine the relationship of an employer and employee given advances in education, technology, the role of the modem corporation and social changes which necessarily enhance individual autonomy.[11]

As social conditions change, then so does vicarious liability. In the leading English case of *Market Investigations v Minister of Social Security*,[12] Cooke J acknowledged that the time had come to acknowledge that while control would often be relevant, it was no longer a sole determining factor for determining an employment relationship. In a judgment which shows an exemplary command of developments in the common law world, Cooke J noted concerns expressed in Australia,[13] United States[14] and in the Privy Council[15] that the test for the employment relationship needed to take account of the substance of the parties' relationship and look at matters such as whether the worker provides his own equipment, hires his own helpers, whether he is likely to profit personally and the degree of financial risk he takes, in addition to that of control. This fact-based economic reality test has since been adopted across the common law world.[16]

The application of the test across English, Australian and Hong Kong law is revealing.[17] The leading English case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*[18] demonstrates clearly that modern working relationships often do not offer a clear delineation between "employees" and "independent contractors" to whom vicarious liability does not apply. Here, the workers were lorry drivers, delivering concrete for the defendant company. The vehicles were owned by the workers, but paid for via a finance organisation associated with the company, painted in company colours, and the drivers were obliged to wear the company uniform. They equally had to obtain the company's permission to hire a replacement driver and were prohibited from operating as a carrier of goods except under contract. They were paid, however, at mileage rates under a contract which expressly declared them to be independent contractors. The court took the view that, on balance, the owner-drivers were "small business men", who owned their own assets and incurred both the chance of profit and the risk of loss. The defendant company would therefore not have been found vicariously liable for their actions.

Today, then, the task for the courts is to divide entrepreneurs from workers employed in the 'gig' economy and often labelled "independent contractors" to minimise the outgoings of the employer in terms of tax, sick pay and state insurance contributions. The decision of the High Court of Australia decision in *Hollis v Vabu*[19] illustrates well the difficulties facing the courts in identifying which relationships should give rise to vicarious liability. Here Mr Hollis had been injured by a negligent bicycle courier identifiable only by his uniform which bore the name of the owners of the courier business–the defendant. Those familiar with the Deliveroo

[11] *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 per Kirby J. at 563.
[12] [1969] 2 Q.B. 173, 184-185.
[13] *Queensland Stations Proprietary Ltd. v. Federal Commissioner of Taxation* (1945) 70 C.L.R. 539, the "drover" case.
[14] *United States of America v Silk* 331 U.S. 704 (1946) .
[15] *Montreal v. Montreal Locomotive Works Ltd* [1947] 1 D.L.R. 161.
[16] See, for example, *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 C.L.R. 16 (Australia), *671122 Ontario Ltd v Sagaz Industries Canada Inc* [2001] SCR 983 (Canada) and *Lee Ting Sang v Chung Chi-keung* [1990] 2 A.C. 374 (Hong Kong).
[17] See, generally, E. McKendrick, 'Vicarious Liability and Independent Contractors – a Re-examination' (1990) 53 M.L.R. 770; R Kidner, 'Vicarious Liability: for whom should the employer be liable?' (1995) 15 L.S. 47.
[18] [1968] 2 Q.B. 497.
[19] (2001) 207 C.L.R. 21.

cyclists who wind their way through the streets of major cities will be aware of both the concept and the dangers over-burdened cyclists riding at speed can cause to pedestrians and, indeed, any other road-users. As in *Ready Mixed Concrete*, there were factors supporting both independent contractor and employee status. The couriers were paid by fixed rates per job, required to use their own bicycles and were able to deal with the company as sole traders or members of a partnership. However, they wore uniforms, were provided with radio equipment by the company and were allocated jobs by radio. The company provided strict instructions concerning dress, appearance, language, delivery procedures and dealing with clients, and undertook the provision of insurance for the couriers (deducting the amounts from their wages). The majority[20] of the High Court of Australia found the couriers to be employees of the company for whom it was vicariously liable. The high degree of control exercised by Vabu over unskilled labourers, combined with the limited investment involved in purchasing a bicycle useable for leisure activities as well (as opposed to a large lorry) combined with the fact that the uniformed couriers were presented to the public as emanations of Vabu, convinced the majority that they should be treated as employees. Such an approach reflects the realities of modern employment practices (and their impact on tort victims). In the words of McHugh J, "Rather than attempting to force new types of work arrangements into the so-called employee/independent contractor 'dichotomy' based on medieval concepts of servitude, it seems a better approach to develop the principles concerning vicarious liability in a way that gives effect to modern social conditions."[21]

Similar tensions have arisen in Hong Kong. Prior to 1997, tort law in Hong Kong had dutifully followed English precedents with infrequent appeals to the Privy Council which, with a few minor exceptions, clarified existing law rather than breaking new ground.[22] However, with the establishment of a new Court of Final Appeal in 1997, the possibility arose for a distinctive Hong Kong common law of tort. Under the Basic Law of Hong Kong, the common law continues to be applicable post-handover,[23] but the courts are now free to refer to precedents from *any* common law jurisdiction.[24] In relation to vicarious liability, the Privy Council decision in *Lee Ting Sang v Chung Chi-keung*,[25] which had accepted that Hong Kong law should adopt the approach of Cooke J. in *Market Investigations Ltd. v Minister of Social Security*, is still followed. In *Poon Chau Nam v Yim Siu Cheung* in 2007,[26] the court faced a compensation claim from an air-conditioning technician who had been injured when the welding electrode rod he was using suddenly broke, severely injuring his left eye. On the facts, the plaintiff had been the only casual worker employed by the defendant and his wages had

[20] Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ in a joint judgment. McHugh J concurred in the result but not the reasoning. Callinan J dissenting.
[21] *Hollis v Vabu* (n 19), [72]. See also Mason J in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 28 f.
[22] See R. Glofcheski, 'Tort law' in S.N.M. Young and Y. Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (CUP, 2013) 524. The four cases he regards as of lasting importance are *Edward Wong Finance Co. Ltd v. Johnson Stokes & Master* [1984] A.C. 296 (standard of care of solicitors in their duty to clients); *Yuen Kun Yeu v. A-G of Hong Kong* [1988] A.C. 175 (Government regulators duty of care to bank depositors); *Ng Chun-pui v. Lee Chuen-tat* [1988] 2 H.K.L.R. 425 (effect of the application of *res ipsa loquitur*); and *Lee Ting-sang v. Chung Chi-keung* [1990] 1 H.K.L.R. 764 (requirements for a contract of service).
[23] Article 8 BL.
[24] Article 84, BL.
[25] [1990] 2 A.C. 374, 382 per Lord Griffiths.
[26] (2007) 10 HKCFAR 156. This was an employer's compensation claim under the Employees' Compensation Ordinance.

been calculated on a daily basis, with no employer contribution to the mandatory provident fund. He filled in a time sheet every day after work, stating the working hours and place for the calculation of wages, overtime allowance and travelling expenses. He was provided with tools when needed. In overturning the negative rulings of the lower courts, the Court of Final Appeal (CFA) found a number of indicia of employment: the defendant owned the business in question and decided which, if any, jobs should be assigned to the plaintiff, paying him at a daily rate. All the profits and losses of the business were for the defendant's account with the plaintiff bearing no financial risks and reaping no financial rewards beyond his daily-rated remuneration. Equipment was owned by the defendant and not the plaintiff. Essentially, then, the plaintiff worked alongside other workers as an employee; the only real difference being that his employment was of a casual nature whereas theirs was permanent and paid on a monthly basis. In the words of Mr Justice Ribeiro PJ:

> The modern approach to the question whether one person is another's employee is therefore to examine all the features of their relationship against the background of the indicia developed in the abovementioned case-law with a view to deciding whether, as a matter of overall impression, the relationship is one of employment, bearing in mind the purpose for which the question is asked.[27]

Glofcheski has noted, however, a difference in the typical tort litigant in Hong Kong: he will be an injured worker who is almost always successful at the end of the appeal process either because of the court's sympathetic interpretation of the facts or in some cases because of the court's flexible interpretation or incremental development of the law.[28] On this basis, the courts have maintained a generous approach to the question of employee status and sought to develop a more rigorous standard that employers must follow in providing safe working conditions for their employees.

Yet while consensus exists in developing a broader notion of the employment relationship, there remains disagreement as to whether the relationship should extend to informal working relationships "akin to employment" which are becoming more common with the disintegration of traditional employment relationships and the casualisation of labour.[29] In *JGE (or E) v English Province of Our Lady of Charity*,[30] the English Court of Appeal accepted that priests (who are office-holders and not employees) could be described as "akin to employees" and would then be brought within the scope of the doctrine of vicarious liability. The leading UK Supreme Court decision of *Various Claimants v Catholic Child Welfare Society (CCWS)*[31] confirmed that while the vast majority of cases would relate to relationships under a contract of employment, the courts should examine whether the individual tortfeasor "was working on behalf of an enterprise or on his own behalf and, if the former, how central the workman's activities were to the enterprise and whether these activities were integrated into the organisational structure of the enterprise."[32] This approach has been followed in *Cox v*

[27] Ibid., [18].
[28] Glofcheski (n 22) 526.
[29] See H. Collins, 'Independent contractors and the challenge of vertical disintegration to employment protection law' (1990) 10 OJLS 353; J. Prassl, *The Concept of the Employer* (OUP, 2015).
[30] [2012] EWCA Civ 938, [2013] Q.B. 722. It also extends to ministerial servants: *A v The Trustees of the Watchtower Bible and Tract Society and others* [2015] EWHC 1722 (QB).
[31] [2012] UKSC 56; [2013] 2 A.C. 1 at [35].
[32] *CCWS* ibid., [49] per Lord Phillips.

Ministry of Justice[33] and *Armes v Nottinghamshire CC*,[34] where the Supreme Court expanded further the range of relationships which could be described as "akin to employment" to include a prisoner working in a prison kitchen and a foster parent caring for children on behalf of a local authority.[35] Hong Kong has yet to cross the line into "akin to employment", although recent case-law does indicate that it is likely to follow. Its courts have accepted the relevance of the *CCWS/Cox* principle, even if it is currently being circumspectly applied.[36] The recent case of *Tsoi Wing Yuk v Perfect Marble Company Ltd*[37] while denying vicarious liability on the facts, did use the *CCWS/Cox* test to examine whether the negligent marble worker had carried out activities "as an integral part of the business activities carried out by a defendant and for its benefit". On the facts, he had not.

However, Australia continues to reject such an approach. This is despite attempts by Justice McHugh to put forward a similar idea of a "representative agent" in cases such as *Hollis* itself,[38] which would have extended vicarious liability to some independent contractors.[39] Leeming J.A. in *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* asserted that, until the High Court determines otherwise, the distinction between independent contractors and employees is regarded in Australia as a basic proposition central to the law relating to vicarious liability, which is "too deeply rooted to be pulled out".[40] Such an approach was also adopted in the clergy abuse case of *Trustees of Roman Catholic Church v Ellis*;[41] the Court rejecting on that basis a claim by a plaintiff, who had been sexually abused by an assistant priest, that the Roman Catholic Archdiocese of Sydney was vicariously liable for the abuse.

2.2 A broader course of employment test?

Vicarious liability also requires that the tort is committed in the course of employment. Serious criminal misconduct, such as the sexual abuse, had previously been found not to satisfy the Salmond test in that it could not be described as conduct "authorised by the master or amounting to a wrongful and unauthorised mode of doing some act authorised by the master."[42] The UK House of Lords, however, in 2001 in *Lister v Hesley Hall Ltd*[43] overturned this test for

---

[33] [2016] UKSC 10, [2016] A.C. 660.

[34] [2017] UKSC 60, [2018] A.C. 355. See also the recent Court of Appeal decision in *Barclays Bank plc v Various Claimants* [2018] EWCA Civ 1670 where Irwin L.J. commented that while a "bright line" test dividing employee and independent contractor would make easier the conduct of business for parties and their insurers, ease of application would not be permitted displace or circumvent the principles now established by the Supreme Court: [61].

[35] See also Canada: in *John Doe v Bennett* [2004] 1 SCR 436 the court held that the relationship between a bishop and a priest in a diocese was "akin to an employment relationship", inasmuch as the priest took a vow of obedience to the bishop, the bishop exercised extensive control over the priest, including the power of assignment, the power to remove the priest from his post and the power to discipline him. See K. Calitz, 'The liability of churches for the historical sexual assault of children by priests' (2014) 17(6) *PER: Potchefstroomse Elektroniese Regsblad*, 2452. For the influence of *Bennett* on UK law, see D. Tan, 'A sufficiently close relationship akin to employment' (2013) 129 L.Q.R. 30.

[36] R. Glofcheski, *Tort Law in Hong Kong* (4th ed., Sweet and Maxwell 2017) 488.

[37] [2016] HKEC 818, [64]-[66], Deputy High Court Judge Marlene Ng. See also *Talat Zahid v Cheung Fat Metal Trading Ltd* [2017] HKEC 1297.

[38] *Hollis* (n 19), [93]. See also *Scott v Davis* [2000] HCA 52, [34].

[39] Rejected by the majority of the High Court in *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19, (2006) 226 C.L.R. 161 and *Scott v Davis* [2000] HCA 52, (2000) 204 C.L.R. 333.

[40] [2013] NSWCA 250, (2013) 85 NSWLR 335, [14], quoting *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19, (2006) 226 C.L.R. 161, [12] and [33].

[41] (2007) 70 NSWLR 565, [2007] NSWCA 117.

[42] *Trotman v North Yorkshire County Council* [1999] L.G.R. 584.

[43] [2001] UKHL 22, [2002] 1 A.C. 215.

intentional torts such as abuse, favouring a test of "close connection": an employer would be held vicariously liable for the intentional torts of his employees where the commission of the tort was *so closely connected to the employment that it would be fair and just to hold the employer vicariously liable*.[44] This "close connection" test was inspired by the Supreme Court of Canada's decision in *Bazley v Curry*,[45] which had accepted that vicarious liability would generally be appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. This could be justified on the basis that the imposition of vicarious liability would serve the policy considerations of the provision of an adequate and just remedy and of deterrence. Subsequent decisions of the UK Supreme Court have followed the *Lister* approach and urged the need for the course of employment test to be applied broadly, in relation to both negligence and intentional torts. In 2016, Lord Toulson in *Mohamud v WM Morrison Supermarkets plc*[46] stated that in future the court should focus on two questions:

i. What functions or field of activities had been entrusted by the employer to the employee (or, in everyday language, what was the nature of the employee's job)? *and*
ii. Was there a sufficient connection between the position in which the employee is employed and his wrongful conduct which would make it "right" for the employer to be held liable as a matter of social justice? [47]

The Supreme Court, on this basis, was prepared to accept that a racist attack on a customer by a shop worker was sufficiently within the broad field of the activities entrusted to the employee to satisfy the "course of employment" test. Khan had been employed to attend to customers and respond to their enquiries. His violent assault was characterised simply as a foul mouthed and violent means of undertaking the "field of activities" assigned to him.

Bearing in mind the radical nature of such developments, it is of interest that the Hong Kong Court of Final Appeal in *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* applied not only the *Lister* test, but confirmed that it would be applicable to both negligence and intentional torts in 2002. (At the time, this was far from clear in English law). The case involved a hotel doorman using one of the hotel's limousines to get food for himself and his colleagues. He drove negligently and seriously injured two pedestrians. Bokhary PJ, giving the lead judgment, endorsed the reasoning of Lord Steyn in *Lister* and McLachlin J in *Bazley v Curry*. He adopted a straightforward approach to the test:

> By "close connection" is meant a connection between the employee's unauthorised tortious act and his employment which is so close as to make it fair and just to hold his employer vicariously liable. I consider close connection to be an intellectually satisfying and practical criterion for vicarious liability. It imposes vicarious liability when, but only when, it would be fair and just to do so … The concept is a simple one which ought not to be complicated by reading other requirements into it. [48]

Here, there was a practice of collecting food for staff (particularly when the canteen was closed) which benefited not only staff, but also the hotel to ensure its staff were adequately fed. The

[44] *Lister* [2001] UKHL 22, [28] (Lord Steyn).
[45] (1999) 174 DLR (4th) 45, [1]. *Bazley* also concerned the question of vicarious liability for sexual abuse of a child in a residential care facility.
[46] [2016] UKSC 11, [2016] A.C. 677.
[47] *Mohamud* ibid., [44]-[45] per Lord Toulson.
[48] [2002] HKLRD 844 at [19] and [24] per Bokhary PJ. Applied in *Li Hoi Shuen v Man Ming Engineering Trading* [2006] HKCFI 53, [2006] 1 HKLRD 84 (murder by co-worker not closely connected to employment); *Ling Man Kuen v Chow Chan Ming* [2006] HKEC 1566 (assault by supervisor closely connected to employment).

doorman was also authorised to drive hotel limousines, for example if they obstructed the hotel forecourt for other vehicles. On this basis, it would be fair and just to hold the hotel vicariously liable.

This decision was followed by the HK Court of Appeal in 2015 in *Yeung Mei Hoi v Tam Cheuk Shing*,[49] applying the close connection test to a fight between two employees working as security guards in a residential estate managed by the second defendant. Here, Tam had sworn at Yeung and hit him with his fist, striking at Yeung's head with a walkie-talkie. The Court held that having put a system of supervision and discipline in place, there was an inherent risk that an employee might react in an unauthorized way, such as swearing and assault, when criticised by the plaintiff (his supervisor) for his performance as a security guard. More recently, in *Chan Shek Ho v Shiu Ho Chi*,[50] the Court of First Instance found an assault by the defendant's employee (a warehouse worker) on a truck driver while he was unloading goods at a warehouse to be closely connected with his employment. The court confirmed that:

> … in applying the "close connection" criterion, the concept of employment must be viewed broadly, and the nature of employment is not to be ascertained merely by attempting to tabulate the employee's duties. It is necessary to stand back and see how the employer's activities were actually carried out and how that exposed the public to the risk of tortious harm caused by the employee.[51]

Again the adoption of a broad approach seems consistent with developments in the UK Supreme Court, notably *Mohamud,* and highlights the tendency in recent cases towards an increasingly liberal protection of innocent third parties.[52]

In contrast, the High Court of Australia in *Prince Alfred College v ADC*[53] has refused to follow the *Lister/Mohamud* approach, expressly finding *Mohamud* to be wrongly decided. In rejecting the position of the UK, Hong Kong and Canadian courts as too reliant on general principle and policy, the HCA proposed an alternative test of "occasion".[54] Under this, the courts should focus on the *role* given to the employee and *the nature of his responsibilities* to establish whether his employment had been the "occasion" for the commission of the wrongful act. The court would take into account matters such as authority, power, trust, control and the ability to achieve intimacy with the victim. The relevant approach was, therefore, to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In specifying a test of "occasion", the High Court went back to basics: its 1949 decision in *Deatons v Flew*[55] in which Dixon J. asked whether the intentional tort was one of those wrongful acts to which the ostensible performance of his employer's work gave "occasion".[56] This is a deliberately narrower formulation to that found in UK and Canadian law. It is fact-specific. In particular, it requires the plaintiff to identify a situation of power-disparity and vulnerability between him and his abuser.

---

[49] [2015] 2 HKLRD 483, [2015] 4 HKC 1.
[50] [2018] HKEC 85, citing *Mohamud* at [25], 6 April 2018.
[51] Ibid., [21] per Deputy High Court Judge Marlene Ng.
[52] See A. Pang, '*Yeung Mei Hoi v Tam Cheuk Shing* and Enterprise Liability in Tort' (2016) 10 *Hong Kong Journal of Legal Studies* 135, 138. She argues that if enterprise liability is permitted, the Court of Final Appeal ought to identify what the limitations in holding an employer liable are and justify them. See, in particular, Cheung JA (n 48) 490-491.
[53] [2016] HCA 37, (2016) 258 C.L.R. 134
[54] Ibid., [81].
[55] [1949] HCA 60. *Deatons* was regarded as unjust and wrongly decided in *Mohamud*: [2016] UKSC 11, [30].
[56] (n 53), [81].

2.3 A common law approach to vicarious liability?

Drawing comparative conclusions from the above analysis, what we see in all three jurisdictions is a willingness to recognise that modern vicarious liability must take account of changes to employment relationships. On this basis, the bicycle courier in *Hollis* and the casual worker in *Poon Chau Nam* who find themselves without the security of a permanent contract of employment but obliged nevertheless to work according to the instructions and timetable of their employer can be classified as "employees". In a world of zero hour contracts, this is to be applauded. Nevertheless, a question remains to what extent vicarious liability should extend to the so-called "dependent" contractors, that is, workers who are not technically employees but nevertheless play an integral role in the operation of the defendant's enterprise. Is the inclusion of relationships "akin to employment" a logical next step given the precarious nature of many modern employment relationships or, as stated by the Australian courts, a step too far? It is clear that a test of "employee" based on economic reality must draw the line somewhere, but there is not as yet consensus in the common law world where that line should be.

The "course of employment" test has also changed over time with the UK, Canada and Hong Kong adopting a test of "close connection" which leaves much to the discretion of the courts and is now accepted to be as applicable to negligence claims as those of intentional torts. Commentators have questioned, however, how much guidance *Mohamud, Ming An* and *Yeung Mei Hoi* provide in determining how "close" a connection must be. Plunkett and Morgan have both criticised the test as overly generous and seeming to apply a test of mere causal connection.[57] For Yap, too much emphasis is placed on what fairness and justice require, without highlighting that in *Bazley* the SCC had sought to examine whether there was a *significant* connection between the creation or enhancement of a risk and the wrong in question.[58] Tan also notes a trend in Hong Kong and Singapore tort law towards a more liberal interpretation of the close connection test.[59] Much of the *Mohamud* test seems to rest on how the court characterises the facts of the case: is the act of a racist employee shouting abuse at an individual entering his employer's premises significantly connected to his concern to remove the individual from these premises or simply an act of abuse which he would have committed whether he had met the individual in a park or while watching a game of football? Yap and Glofcheski have also been critical of the open-textured nature of the test put forward by Justice Bokhary in Hong Kong law.[60] Glofcheski, in particular, warns that in failing to pay sufficient attention to the distributive effects of this new formulation which threatens a great expansion to the scope of employers' liability, the CFA is moving to a very broad notion of vicarious liability with cases traditionally dismissed as "frolic of his own" cases, such as *Storey v Ashton*,[61] included in the doctrine.[62]

---

[57] J. Plunkett, `Taking Stock of Vicarious Liability' (2016) 132 L.Q.R. 556; P. Morgan, 'Certainty in vicarious liability: a quest for a chimaera?' (2016) 75 C.L.J. 202. See also P. Giliker, 'Vicarious Liability in the UK Supreme Court' (2016) 7 *UK Supreme Court Yearbook* 152, 165-166.

[58] P.J. Yap, 'Enlisting Close Connections: A Matter of Course for Vicarious Liability' (2008) 28 L.S. 197, 210.

[59] D. Tan, 'Internalising externalities: An enterprise risk approach to vicarious liability in the 21st century' (2015) 27 SALJ 822, 839.

[60] Yap (n 58), 210; Glofcheski (n 22) 537.

[61] (1869) LR 4 QB 476 (delivery driver visiting the home of a colleague's relative on personal business).

[62] R. Glofcheski, 'A frolic in the law of tort: Expanding the scope of employers' vicarious liability' (2004) 12 Tort L Rev 1, 13.

For the UK Supreme Court, this more generous approach can be justified by focussing on what it identifies as the five underlying policy objectives of vicarious liability, namely:

(i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability (deeper pockets);
(ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer (delegation of task);
(iii) the employee's activity is likely to be part of the business activity of the employer (activity risk);
(iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee (risk creation); and
(v) the employee will, to a greater or lesser degree, have been under the control of the employee (control).[63]

While not the sole justification, the growth of vicarious liability does seem to be indelibly tied to an acceptance of the internalisation of the risks created by employees connected to their work. This derives from the judgment of McLachlin J in the Canadian case of *Bazley v Curry*:[64]

> The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organisation that creates the enterprise and hence the risk should bear the loss.

Pure risk theory, however, does not tell us **why** vicarious liability is placed on the employer (not just any risk-creator) and why it is only the risk of *tortious* (as opposed to any harmful) behaviour which gives rise to responsibility for the injury suffered. McIvor rightly comments that "such reasoning could be just as easily be applied to any risk-producing activity that is traditionally covered by insurance, most obviously the act of driving."[65] It also does not explain how it fits with the otherwise dominant force of the tort of negligence and ideas of corrective justice in common law tort law. It is noticeable that the UK Supreme Court has proven reluctant to rely *solely* on this ground and indeed in *Armes*, the factors of control and deeper pockets were also influential in its analysis.[66] Glofcheski also argues that the current position in Hong Kong in reality involves an unmitigated search for deeper pockets premised on acceptance by the Hong Kong courts of the arguments of enterprise risk.[67] Fundamentally, risk-based analysis may be relied upon to justify extending vicarious liability, but it fails to provide clear guidance on the limits of liability, in particular in determining the closeness of the connection needed to establish vicarious liability.[68]

---

[63] *CCWS* ibid, [35].
[64] *Bazley v Curry* (1999) 174 D.L.R. (4th) 45, 60. See also P.S. Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) 171: "[t]he master ought to be liable for all those torts which can fairly be regarded as reasonably incidental risks to the type of business he carries on" (cited in *Lister*). Query whether these two tests are the same. See, generally, D. Brodie, 'Enterprise liability: Justifying vicarious liability' (2007) 27 O.J.L.S. 493.
[65] C. McIvor, 'The Use and Abuse of the Doctrine of Vicarious Liability' (2006) 35 C.L.W.R. 268, 296.
[66] [2017] UKSC 60, [63]. See also *Barclays Bank plc v Various Claimants* [2018] EWCA Civ 1670.
[67] In *Yeung Mei Hoi,* Cheung JA, it may be noted, made express reference to the discussion of policy in *CCWS*, and acknowledged the relevance of risk as a criterion in the close connection test: (n 48) 489.
[68] See also Plunkett (n 57): "Given that the enterprise liability justification merely requires there be *some* connection between the tort and the tortfeasor/defendant relationship, the court's suggestion that it

The High Court of Australia remains opposed to a policy of strict liability based on notions of risk creation and enterprise liability.[69] It is, however, unclear whether its alternative "occasion" test will prove easier to apply in practice.[70] Goudkamp and Plunkett, for example, argue that the Australian analysis is overly focused on terminology at the expense of content and that a test of authority, power, trust, control and the ability to achieve intimacy is likely to make little sense in relation to negligence claims.[71] What is clear, however, is that the High Court of Australia is not prepared to permit the courts a broad discretion to determine the relationship giving rise to vicarious liability and the scope of its cover. In *Prince Alfred College*, it is seeking to keep control of the doctrine and the burden it places on employers and, in so doing, rejects risk-based reasoning as a justification for the imposition of strict liability. Australia represents, then, a cautious approach, distrustful of judicial expansion of liability and a liability framework reliant on the existence of insured, deeper pockets defendants. Scarred by an insurance crisis in the 2000s,[72] which led to statutory reform of negligence law in Australia,[73] the Australian courts have refused to expand vicarious liability in contrast to the other common law jurisdictions covered in this article.

Adoption of risk-based reasoning is not, therefore, a characteristic of the common law, but a decision of each jurisdiction whether it is appropriate in the light of its insurance framework and domestic policy framework. It reflects a desire to ensure victims obtain compensation, particularly where the victims are vulnerable (*Lister*) or where policy suggests protection is needed (racist attacks in *Mohamud*; careless driving in *Ming An*). It also naturally requires the courts to limit the ability of the defendant to obtain an indemnity from the tortfeasor, which vicarious liability, as a form of secondary liability, traditionally allows.[74] This has occurred in practice (in the UK due to a gentlemen's agreement between insurers)[75] except in the case of intentional torts.[76] Fundamentally, however, risk-based reasoning requires an acceptance of the active role of the judiciary in developing social policy regardless of the absence of fault.

somehow also provides guidance as to when that relationship will be *sufficiently close* is therefore misguided; at best, it simply restates the problem" at 560-561.

[69] *Prince Alfred College v ADC* (2016) 258 C.L.R. 134 at [82].

[70] Commentators have been quick to query whether any meaningful difference can be found between the employment providing the "occasion" or "opportunity" for engaging in wrongdoing: see, for example, D. Ryan, 'From opportunity to occasion: Vicarious liability in the High Court of Australia' [2017] C.L.J. 14, 17 and A. Gray, 'Liability of Educational Providers to Victims of Abuse: A Comparison and Critique' (2017) 39 Sydney Law Review 167.

[71] J. Goudkamp and J. Plunkett, 'Vicarious liability in Australia: On the move?' (2017) 17 O.U.C.L.J. 162, 167. This is true and it is not clear the test would apply in this context.

[72] See R. Davis, 'The tort reform crisis' (2002) 25 UNSWLJ 865; P. Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 Melb U L Rev 649.

[73] Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (Canberra, 2002); B. McDonald, 'The Impact of the Civil Liability Legislation on Fundamental Principles and Policies of the Common Law of Negligence' (2006) 14 T.L.J. 268.

[74] See *Lister v Romford Ice* and Cold Storage Co Ltd [1957] A.C. 555.

[75] See G. Gardiner, 'Lister v The Romford Ice and Cold Storage Company Ltd' (1959) 22 M.L.R. 652.

[76] See K. Barker et al, *The Law of Torts in Australia* (5th ed., OUP, 2012) at 17.12; R. Glofcheski, *Tort Law in Hong Kong* (4th ed., Sweet and Maxwell, 2017) at 527.

3. Placing vicarious liability in comparative perspective: Civil law (France)

Vicarious liability is not, however, solely a common law concept. A civilian version (liability for the acts of others) may be found in art. 1242(5) of the French Civil Code (*Code civil*), whose wording (if not numbering) has been unchanged since 1804.[77] This holds that "[m]asters and employers. . . [are liable] for the damage caused by their servants and employees in the functions for which they have been employed." This model has been generally adopted by European systems which follow the Romanistic legal tradition, including Belgium[78] and Italy.[79] While this is not the only civilian model – German law relies on a rebuttable presumption of fault placed on the employer[80]- it is the dominant one. Systems based on the Germanic legal tradition have tended over the 20th century to render it increasingly difficult for employers to rebut the presumption of fault.[81] In practice, therefore, civilian systems have moved towards strict liability for the tortious acts of another.[82] French law will be used as a representative civilian jurisdiction.

The civilian law of tort (or delict) has, like the common law, changed over time. Inevitably, provisions set down in a nineteenth century civil code have proved wholly inadequate to deal with the need for tortious intervention following the industrial revolution, mechanisation and significant societal and economic changes. It was left, therefore, for the courts to develop principles of tort law based on the provisions of the code. The result is that much of French tort law lies outside the *Code civil*.[83] There has therefore been a long-standing need to consolidate case-law developments within the tort provisions of the Code itself. Inspired by the reforms of French contract law in 2016,[84] the French Ministry of Justice in March 2017 published proposals to reform French tort law, following public consultation between April and July 2016.[85] It is not, however, just a matter of bringing the Civil Code up-to-date to reflect the practice of the courts. The Ministry has stated that:

---

[77] Reforms in 2016 to the French Civil Code led to a renumbering of its articles. Art. 1242(5) was formerly art. 1384(5). Again while liability for the acts of others extends beyond employer/employee liability e.g. parental liability for the torts of their children, this section will focus on the employer/employee relationship.

[78] Art 1384 III *Code civil belge*.

[79] Art 2049 *Codice civile*.

[80] Para 831(1), BGB: "A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to the extent that he is to procure devices or equipment or to manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised": https://www.gesetze-im-internet.de/englisch_bgb/index.html (accessed 7 August 2018). See also the Swiss Code of Obligations, art. 55; Spanish Civil Code art. 1903.

[81] See, for example, J. Fedke and U. Magnus, 'Liability for damage caused by others under German law' and M. Martin Casals and J.S. Feliu, 'Liability for damage caused by others under Spanish law' in J. Spier (ed), *Unification of Tort Law: Liability for Damages Caused by Others* (Kluwer Law International, 2003).

[82] See, generally, Spier ibid.

[83] See J-S Borghetti, 'The culture of tort law in France' (2012) 3 J.E.T.L. 158.

[84] Ordonnance of 10 February 2016 (now ratified by loi n° 2018-287 of 20 April 2018). See G. Helleringer, 'The Anatomy of the New French Law of Contract' (2017) 13 E.R.P.L. 355; S. Rowan, 'The new French law of contract' (2017) 66 I.C.L.Q. 805.

[85] Projet de réforme du droit de la responsabilité civile: http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/projet-de-reforme-du-droit-de-la-responsabilite-civile-29782.html (accessed 7 August 2018). An excellent English translation exists, prepared by Professors Simon Whittaker of Oxford University and Jean-Sébastien Borghetti of University of Paris II: http://www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf (accessed 7 August 2018).

In addition to the process of consolidation, the *avant-projet* is responding to the legitimate expectations of personal injury victims by adopting a complete and coherent set of rules which will improve compensation for personal injury. It proposes equally innovative solutions to maintain the preventative function of liability in tort.[86]

Changes therefore are being proposed for all aspects of French tort law, including that of vicarious liability.

With this in mind, in this section I will examine liability under art. 1242(5) for the acts of others in French law. In common with the systems reviewed above, French law requires:

i. A relationship by which one person may be held liable for the harmful acts of others;
ii. The commission of wrongdoing by the employee or subordinate; and
iii. Liability which arises in the functions for which the employee/subordinate has been employed.

This provision was originally based on a *presumption* of fault, albeit one that was irrebuttable in the case of masters and employers. The preparatory works for the Civil Code indicate that this article, in apparent conflict with natural law ideas of personal responsibility, was explicable as a matter of justice: "those on whom it is imposed can blame themselves, at the very least, for weakness, others for bad choices, all for negligence."[87] Subsequently, however, the courts came to accept that the provision should be viewed as based on strict liability. In the words of leading commentators, Viney, Jourdain and Carval:

We will simply note that no-one today maintains, at least in France, that the liability of the employer is only explicable on the basis of fault, not even on the basis of a presumption of fault in the choice or supervision of his employees. . . [I]t is appropriate, in building a regime adapted to the needs of contemporary society, to consider the liability of the employer in a new light, considering it above all as a means of imputing to the business the risks created by its activities.[88]

The proposed changes to the Civil Code consolidate this change – vicarious liability is now found in a section entitled "The imputation of harm caused by another person" (*L'imputation du dommage causé par autrui*). Liability under new article 1249 is expressly stated to be *de plein droit*, that is, strict liability.

3.1 Determining the employer/employee relationship (lien de préposition)

Clear parallels may be found between the French and common law approach towards the relationship requirement. An employment relationship (*lien de préposition*) is said to exist when the employer (*commettant)* has the right to give the employee (*préposé*) orders or instructions how to do the work he or she is employed to do.[89] While French law started with a test of control (*subordination juridique*),[90] this too came to be challenged over time due to

[86] http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/projet-de-reforme-de-la-responsabilite-civile-traduit-en-anglais-30553.html (trans P Giliker).
[87] Attributed to Treilhard, who contributed to the drafting of the Civil Code, whose comments of 1803 are reported, in PA Fenet, *Recueil complet des travaux préparatoires du Code civil*, vol 13 (1827, reprinted 1968) 468 (trans P Giliker).
[88] G Viney, P Jourdain and S Carval, *Les conditions de la responsabilité* (4th edn, LGDJ, 2013) no 791-1 (trans P Giliker). See also P Jourdain, 'La responsabilité du fait d'autrui à la recherche de ses fondements' in: P Conte et al (eds), *Mélanges Lapoyade-Deschamps* (PU Bordeaux, 2003) 67.
[89] B. Fagès, *Droit des obligations* (7th ed., LGDJ, 2017) n° 398.
[90] The classic French case is Cass civ 4 May 1937, Dalloz 1937.363 (*Veuve Meyer*).

changes in working practices. While the test based on authority and subordination remains (and such authority must be real and not merely apparent),[91] more recent case-law has moved to a more flexible interpretation. The power to give instructions need not have a contractual or legal basis, but may simply exist as a matter of fact. Indeed, it is no longer necessary to prove that such a power has been exercised, provided that the employer (*commettant*) is deemed to possess authority over the employee (*préposé*). This means that the term "préposé" (and note that it is not the more conventional *salarié*[92] or *employé*) will extend to what a common lawyer would regard as an independent contractor. In reality, then, the relationship of authority and subordination is one of form, rather than substance, with the courts examining whether the performance in question was for the purposes (and profit of) the employer.[93] This will extend beyond traditional employment relationships to include relatives or casual acquaintances given a designated task. On this basis, a wife can be the *préposée* of her husband. A case of 1971 illustrates this well.[94] Here, a nurse running a first aid station asked a volunteer helper whom she knew did not have a driving licence to use her vehicle to run an errand. The court had no difficulties in characterising this as a relationship where the volunteer was subject to the orders of the nurse and instructions in the manner of fulfilling a task designed to him, albeit without payment and on one single occasion.

3.2 Determining the course of employment (dans les fonctions auxquelles les commettants les ont employés)

Liability under article 1242(5) depends on the employee committing the tort "in the functions for which they have been employed." Concerns how broadly to interpret this phrase have troubled the French courts as much as those of the common law, notably in a series of cases between 1960 and 1988 which highlighted differences of views between the civil and criminal chambers of the French Supreme Court/*Cour de cassation* (criminal courts in France are able to award compensation for criminal wrongs).[95] A key point of contention – which might sound familiar in view of the discussions above – was whether an *abus de fonctions* (abuse of function, that is, acting for the employee's own ends) by the employee should block vicarious liability. The civil chambers, notably the second chamber, favoured a more restrictive approach to that of the criminal chamber, which excluded liability where the injury arose due to an *abus de fonctions*.

The matter was only resolved by the *Assemblée plénière* of the *Cour de cassation* in its judgment of 19 May 1988[96] in a case involving employee fraud. The test stated is distinctive: liability for the acts of others will be presumed to exist unless the act of the employee is:

(i) without authorisation (*sans autorisation*),
(ii) for his own ends (*à des fins étrangères à ses attributions)* and
(iii) outside the normal duties of his job (*hors de ses fonctions*).

[91] Cass crim 15 February 1972, D 1972.368, JCP 1972 II 17159 note D Mayer, RTD civ 1973.350 obs G Durry.
[92] Who, as the term suggests, must receive a salary in return for his or her labour.
[93] See P. Giliker, 'Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective' (2011) 2 J.E.T.L. 31, 42.
[94] Cass crim 25 May 1971, D 1971 somm 168.
[95] See, generally, J. Bell, S. Boyron and S. Whittaker, *Principles of French Law* (2nd ed., OUP, 2008) 368-373; Giliker (n 93) 51-54.
[96] Cass (Ass plén) 19 May 1988,D 1988.513 note C Larroumet, Gaz Pal 1988.2.640 concl M Dorwling-Carter, Def 1988.1097 note JL Aubert, RTD civ 1989.89 obs P Jourdain.

These three conditions are cumulative and if one is not fulfilled, then there is not an *abus de fonctions* and the employer is held liable. Moreover, the case-law has generally adopted a narrow interpretation of these exoneratory conditions. In a case with echoes of the common law, the *Cour de cassation* in March 2011 held an Institute for the Re-education of Young Deaf and Blind Children (IRSAM) liable under art. 1242(5) for a music teacher who had sexually abused his charges. It had no link with his functions, but the abuse had taken place during his music lessons. The Court found that the employee "had thus found in the exercise of his profession at his place of work and during his working hours the means to commit the fault and the opportunity to commit it" (« avait ainsi trouvé dans l'exercice de sa profession sur son lieu de travail et pendant son temps de travail les moyens de sa faute et l'occasion de la commettre »).[97]

3.3 A civil law approach to vicarious liability?

French substantive law thus resembles that found in UK and Hong Kong law. We can see that civil law systems have also moved away from the traditional salaried employment relationship to a wider formulation which will ensure that victims obtain compensation from "employers". Whilst advocates of risk theory such as Viney[98] find the extension of the *commettant/ préposé* relationship acceptable, and stress that in most cases a traditional employment relationship will exist, this does not receive unanimous support. Academics, such as Molfessis, have argued that:

> The Supreme Court seeks above all to find someone liable … it is guided by the need to achieve a result, rather than the concept … The case in point guides the solution reached, to the detriment of conceptual coherence.[99]

The proposed reforms to the Civil Code indicate that little will change. Art. 1249(1) provides that:

> An employer is liable strictly for harm caused by his employee. An employer is a person who has the power to give orders or instructions to his employee in relation to the performance of his functions.[100]

Here the reforms opt for consolidation – and the current very broad notion of the employment relationship.

The French courts have also adopted a generous test for course of employment. In favouring the position of the criminal chamber, the May 1988 decision recognises the dominance of risk-based reasoning in justifying the imposition of strict liability, here underpinned by the theory of risk-profit (*théorie du risque-profit*), that is, if you profit from another's actions, you must accept the risks associated with these actions. This theory is supported by a background of liability insurance and legislation which requires insurers to meet claims for damage caused by

---

[97] Cass. civ. 2e, 17 March 2011, n° 10-14.468, Bull civ 2011, II, n° 69, JCP G 2011 1333, spéc n° 5 obs C. Bloch. See also Civ. 2e, 12 May 2011, n° 10-20.590, Bulletin civ 2011, II, n° 110.

[98] G Viney, P Jourdain and S Carval, *Les conditions de la responsabilité* (4th edn., LGDJ 2013). Fagès, in contrast, argues that the *risque-profit* rationale is only one of a number of competing justifications which include attributing the employee's tort to the employer or imposing on the employer an *obligation de garantie*: (n 89) n° 398.

[99] See N. Molfessis, 'La jurisprudence relative à la responsabilité des commettants du fait de leurs préposés ou l'irrésistible enlisement de la Cour de cassation, in: H Mazeaud/D Mazeaud/J-MOlivier/J-B Bladier (eds), *Mélanges Gobert* (Economica, 2004) 495, 504 and 512 (trans. P. Giliker).

[100] The translators (n 85) note that: "As will be seen from the definition in this provision, le *commettant* and le *préposé* are understood more widely than the English terms 'employer' and 'employee' which are normally restricted to the persons party to a contract of employment."

both negligent and intentional misconduct for which the employer is held liable. Art L121-2 Insurance Code provides that the insurer shall cover the losses and damage caused by persons for whom the insured is legally liable pursuant to art 1242 of the Civil Code, regardless of the nature and seriousness of such persons' faults. This is treated as having the status of *d'ordre public* and so cannot be modified by agreement. Case-law has also limited the ability of the employer to obtain an indemnity from an employee – an employee is not subject to any personal liability except where, without authorisation, he acted for purposes alien to his attributions.[101]

The May 1988 formula is reflected in art. 1249(3) of the reform proposal: " An employer … is not liable if he proves that the employee acted outside the functions for which he was employed, without authorisation and for purposes alien to his attributions." Again we see a consolidation of existing law. For a system without a formal system of precedent, the influence of the May 1988 case is remarkable. Such a formula, while iconic, does share, however, the weakness of the "close connection" test in that it is easy to state but still leaves the court with considerable discretion how to apply it. What are "*fins étrangères à ses attributions*"? Where exactly does liability end, particularly where the phrasing seems almost that of a defence to strict liability rather than part of the test itself? Borghetti has argued that the dominant ideology of French law is victim-orientated, with an underlying assumption that most people will be insured. In his view, such reasoning, while well-intentioned and supported by strong religious and philosophical convictions,[102] can be simplistic – that strict liability should be encouraged as it ensures victim compensation. He argues that insufficient consideration is made of its broader implications and that regard should be paid to issues such as the situation in which the victim is placed or the type of damage they have suffered. Such doubts are not, however, reflected in the new tort proposals.

4. Placing vicarious liability in comparative perspective: A hybrid socialist legal system in transition (China).

China, as a mixed[103] or hybrid[104] legal system, offers a further perspective from a system in transition. The 2009 Tort Liability Law (TLL) came into force from 1 July 2010[105] and, as Thomas has noted, reflects the values of a country striving to move from a Socialist command economy to a modern economy driven by both exports and domestic demand.[106] For Zhang:

[101] This is the *Costedoat* ruling (Ass. plén. 25 févr. 2000, D. 2000. Jur.673, note Ph. Brun; JCP, 2000, éd. G. II, 10 295, note M. Billiau), now encapsulated in the proposed art. 1249(4) of the reform proposals. Later case-law has clarified that an indemnity may still be obtained in case of criminal fault: *Cousin* (Ass. plén., 14 déc. 2001, D. 2002, Jur. 1230, note J. Julien, Somm. 1317, obs. D. Mazeaud et 2117, obs. B. Thuillier; JCP 2002.II.10026, note M. Billiau).

[102] J-S Borghetti, 'The culture of tort law in France' (2012) 3 J.E.T.L. 158, 173-176.

[103] Such a classification, as Palmer readily accepts, is not unproblematic in that it lumps together systems with very little in common, such as Louisiana and Algeria, or Quebec and China, but it does highlight the narrowness of the common/civil law divide: V.V. Palmer, 'Mixed Legal Systems... and the Myth of Pure Laws' 67 La. L. Rev. (2007).

[104] See J. Husa, *A New Introduction to Comparative law* (Hart, 2015) who describes Chinese law as "a kind of hybrid between the Western regulations models, the traditional Chinese culture and socialist system": 140.

[105] *Zhonghua Renmin Gongheguo Qinquan Zerenfa*, Tort Liability Law of the People's Republic of China (2009). See, generally, H. Koziol and Y. Zhu, 'Background and Key Contents of the New Chinese Tort Liability Law' (2010) 1 J.E.T.L. 328 and D. Morgan, 'The People's Republic of China Tort Liability Law 2009' (2010) 26 P.N. 219.

[106] K. Thomas, 'The product liability system in China: Recent changes and prospects' (2014) 63(3) I.C.L.Q. 755.

Adoption of the Torts Law is a significant step toward building a civil law infrastructure in China. As a hybrid of civil law tradition, common law concepts, and Chinese reality, the Torts Law establishes a legal framework under which civil wrongs are addressed and civil damages are compensated.[107]

The overall approach of the TLL seems to be much more in line with the civil law tradition than it is with the common law.[108] In common with civil law systems, case-law is not an official source of law, although judicial interpretations issued by the Supreme People's Court (SPC) do, in practice, have binding authority and are followed by legal practitioners to clarify difficult civil law related issues.[109] The 2009 Law builds on changes from 1978 onwards to enhance the Chinese legal system, culminating in the General Principles of Civil Law (GPCL)[110] passed in 1986 and the 2009 TLL.[111] As Zhang has indicated,[112] the GPCL (art 43) and relevant judicial interpretations offer recognition that, in Chinese law, an employer may bear tort liability for the damage caused by the employee at the time of performing working duties.[113] In so doing, Chinese law has moved towards an approach similar to that described above and, in so doing, has elected not to adopt the approach of German and Japanese law which it had followed in its 1929 Civil Code and which allows an employer who has exercised due care in the selection and control of the employee to avoid liability.[114] Article 34 of the TLL 2009 now provides that:

(1) Where an employee of a work unit employer[115] causes harm to others for the purpose of performing the work task, the work unit employer shall bear tort liability.

(2) Where, during the period of labour dispatch, a dispatching employee causes harm to others in his performance of duties, the work unit supplying the dispatched employee, if at fault, shall bear the corresponding supplementary liability.[116]

---

[107] M Zhang, 'Tort Liabilities and Torts Law: The New Frontier of Chinese Legal Horizon' (2011) 10 *Richmond Journal of Global Law and Business* 423, 494.

[108] Y. Zhu, 'The Bases of Liability in Chinese Tort Liability Law – Historical and Comparative Perspectives', in: L. Chen and C.H. van Rhee (eds), *Towards a Chinese Civil Code: Comparative and Historical Perspectives* (Martinus Nijhoff, 2012) 335, 339. For example, by listing the interests which may fall under the umbrella of protection of the law, the Tort Liability Law resembles the approach taken in German law.

[109] H. Zheng, 'Overview' in Y. Bu (ed), *Chinese Civil Law* (Hart, 2013) 2.

[110] *Zhonghua Renmin Gongheguo Minfa Tongze* General Principles of Civil Law of the People's Republic of China (1986). For a commentary in English, see W. Gray and H. Zheng, 'General Principles of Civil Law of the People's Republic of China' (1986) 34 Am J Comp L 715.

[111] For a brief historical background (in English) to Chinese law to date, including Western influences during the Qing dynasty and the Civil Code of the Republic of China in 1929 and developments from 1949 onwards, see H. Jiang, 'Ch 17. Chinese Tort Law: Between Tradition and Transplants' in M. Bussani and A.J. Sebok (ed), *Comparative Tort Law*: *Global Perspectives* (Edward Elgar, 2015).

[112] X. Zhang, Legislation of Tort Liability Law in China (Springer, 2009) 3.5.2.

[113] Ding notes, however, that the term "vicarious liability" was not used in 1986 due to its clash with socialist ideology, notably the exploitative nature of the employer-employee relationship: C. Ding, 'Development of Employer's Vicarious Liability: A Chinese perspective' (2014) 5 J.E.T.L. 67, 69.

[114] Art. 188 of the 1929 Civil Code provided: "The employer is jointly liable to make compensation for any damage which the employee wrongfully causes to the rights of another person in the performance of his duties. However, the employer is not liable for the damages if he has exercised reasonable care in the selection of the employee, and in the superintendence of the duties, or if the damage would have been occasioned notwithstanding the exercise of reasonable care."

[115] This translation remains contentious – Koziol and Zhu (n 105) prefer the term "employing entity" (*yongren danwei*) instead of "employer" due to political considerations: 348. See also Zhu (n 108) 350.

[116] Translation taken from Ding (n 113). See also Article 35 which deals with a labour service relationship between individuals and aims to provide a framework for liability regarding auxiliaries of natural persons. In principle, vicarious liability is applicable to parties receiving services when the service provider causes damage to a third party in the course of providing services. Ding argues that the courts narrowly interpret the scope of

An employer, then, will be jointly liable for the tort committed by an employee during the course of employment. The key elements observed in common and civil law systems are apparent: a labour relationship (which may be a written contract of service or a de facto labour relationship), and a tort (no limit is specified),[117] which is committed "for the purpose of performing the work task". There is no provision for an employer indemnity from the employee, although Ding argues that the courts will have a discretion based on the facts of each case, notably in the presence of intentional fault or gross negligence, and highlights the existence of special laws providing for the employer's right to indemnity for torts committed by certain professional employees.[118] In terms of the relationship giving rise to vicarious liability, in China, most commentators see the rationale for vicarious liability resting on the element of control in the employment relationship.[119] This exists when there is personal and economic dependency between the person qualified as employee and the employer. Ding argues that the requirement of work-related tasks includes work authorised or instructed by the employer, in the apparent performance of these duties and which have an inherent connection with the performance of the authorised duties.[120] Bu agrees. Content, time, place, the beneficiary of the conduct, the name in which the conduct is carried out and the connection between the conduct and the intention of the employer are all, Bu asserts, relevant factors in determining the existence of a work-related task. Even if the employee's act exceeds the scope of authorisation, liability will extend to acts relating to the performance of the duties in question.[121] In her comparative study, Ding asserts that current Chinese law now recognises employers' vicarious liability in a manner akin to that in the West, but suggests, nevertheless, that insurance against employer's vicarious liability in China is undeveloped and without Chinese employers purchasing insurance as a matter of course, the doctrine is likely to be confined within reasonable limits.[122] Koziol and Zhu are less certain about this, arguing that art 34 leaves open many questions, notably to what extent vicarious liability will extend beyond the traditional employer/employee relationship.[123]

This brief glance at Chinese law indicates that the economic reforms introduced in China have given rise to a need to deal with civil liability for torts committed by employees of business associations, especially private ones, notably in the context of personal injuries. With economic and societal changes, litigation is becoming more common with a rise in the number of lawyers and a greater willingness to seek recourse in the courts with measures to protect

application of art. 35, excluding a labour service relationship where the individual labour service receiver has no control over the provider: at 83.

[117] Article 2 TLL 2009 provides: "Those who infringe upon civil rights and interests shall be subject to the tort liability according to this Law. 'Civil rights and interests' used in this Law shall include the right to life, the right to health, the right to name, the right to reputation, the right to honour, right to self-image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interests." Translation found at http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn136en.pdf (accessed 7 August 2018).

[118] Ding (n 113) 92-96.

[119] Y. Bu, 'Special types of torts' in Bu (ed) (n 109) 150-151.

[120] Ding (n 113) 86, relying on 'Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Cases of Compensation for Personal Injury' Fa Shi [2003] No. 20 December 26, 2003, Article 9(2) which expands employers' vicarious liability to include liability for intentional acts and gross negligence and defines "work-related task" as "a production or business operation activity or any other labour service activity within the scope of authorisation or instructions of the employer".

[121] Bu (n 119) 151.

[122] Ding (n 113)

[123] (n 105) 348-349.

both consumers and workers and the less well-off generally.[124] While insurance, as Ding indicates above, is not as prevalent as in Western jurisdictions, the compensation goal may nevertheless succeed when claims are brought against state-owned enterprises and wealthy for-profit corporations. Yet, in the absence of mandatory insurance requirements and/or a social practice of insuring against risks and an apparent reluctance to remove entirely the employer indemnity, the Chinese doctrine is unlikely to embrace the broad risk justification seen in the UK and France. Commentators have also noted that the notion of full compensation is not necessarily reflected in damages awards which will serve regulatory and public welfare goals apart from that of compensation. It is important not to assume that a similar legal framework will give rise to similar results. Green rightly terms the law "Tort law with Chinese characteristics".[125]

It is important for the comparatist, then, not to under-estimate the power of existing cultural values and, in particular, the historical, political and sociological norms of the Chinese state. Zhang and Bi, in a recent publication, comment that "the component of liability attribution is and will continue to be […] always influenced by culture, economics, politics"[126] and, on this basis, we should avoid placing too much emphasis on the formal rules and assume them to be politically neutral. De Lisle has remarked on the distinctive "public law" quality of Chinese tort law in which substantive provisions respond specifically to contemporary public policy issues, failures and controversies.[127] On this basis, he argues:

> The differences between Chinese tort law and American common law (and other foreign) tort law remain substantial and appear rooted partly – although far from completely – in China's and the US's (and other systems') relatively more and less 'public' conceptions of tort law.[128]

If we see similarities with the systems previously addressed in this paper, then what does it mean in practice? Zhang, in a fascinating study, has analysed, for example, the political influence held by tortfeasor groups, and the populist pressure aggregating against these groups in determining the orientation of tort law in China and highlights the need to understand the operation of tort law beyond the rules.[129] Tort law exists in a specific context and this will impact on both the application of the rules and the reasoning which underlies their application.

On the basis of the above analysis, the final section of this paper will explore the role of legal culture in shaping the principles of vicarious liability identified above and how a comparative perspective will aid our understanding and critical appreciation of the operation of the law of tort.

---

[124] See A.J. Green, 'Tort Reform with Chinese Characteristics: Towards a "Harmonious Society" in the People's Republic of China' (2008) 10 *San Diego International Law Journal* 127, 146.

[125] See also C. Liu, 'Understanding Socialized Liability Under Chinese Tort Law' (2018) 59 Harv ILJ 16, 18, who argues that it is important to acknowledge that the TLL is characterized by socialism and is used as a tool to maintain social stability, which is the overwhelming goal of the State.

[126] P. Zhang and X. Bi, 'A Significant Aim of the Tort Liability Law of the People's Republic of China: To Promote Social Harmony and Stability', in: H. Koziol (ed), *The Aims of Tort Law: Chinese and European Perspectives* (Vienna: Jan Sramek Verlag, 2017) 115, 131.

[127] J. De Lisle, 'A common law-like civil law and a public face for private law: China's tort law in comparative perspective' in L. Chen and C.H. van Rhee (eds), *Towards a Chinese Civil Code: Comparative and Historical Perspectives* (Leiden: Martinus Nijhoff, 2012) 353

[128] Ibid., 392.

[129] See W. Zhang, 'Understanding the Law of Torts in China: A Political Economy Perspective', *University of Pennsylvania Asian Law Review* 11 (2016) 171.

5. Why compare? Apples and oranges or an insight into law-making and legal culture?

This paper has demonstrated that a common framework for vicarious liability in tort can be identified across different legal systems. The key factors are: (a) a relationship – usually that of employment; (b) a tort; (c) committed in the exercise of the worker's duties or tasks. This transcends different legal traditions and can be seen in Chinese law following the tort law reforms of 2009. To fully understand the operation of vicarious liability in tort, however, we need to go beyond the rules and consider "the law in action". The "law in the books" will only take us so far if we want to understand how vicarious liability operates and what motivates the courts in reaching decisions. Oliphant, for example, has argued that, as a starting point, the culture of tort law embraces the following: societal attitudes towards tort law, the practice of tort law, the "lived experience" of those involved in tort claims, its institutional context and the cultural values embedded in substantive tort law.[130] It is important, he argues, to examine "the attitudes, behaviour and experiences of ordinary people as well as those of legal elites, the deep structures of the tort system as well as its surface features, and what is taken for granted and overlooked as well as what is made explicit in standard accounts".[131] If we are to go beyond, then, comparing apples and oranges and gain a real understanding of the operation of this area of law, we need to contextualise our analysis. Nelken has described a study of legal culture as a "way of describing a relatively stable pattern of legally oriented social behaviour and attitudes … Like culture itself, legal culture is about who we are, not just what we do."[132] It is important also to acknowledge our own limitations as scholars, confined by our own experience, position and perspective, facing "the dilemma of understanding foreign cultures of law without being able to completely transcend the hermeneutic framework and cognitive matrix provided by the domestic culture."[133] Our own training, experience and social and political attitudes will therefore frame our understanding and conceptualisation of the law. A comparative lawyer must therefore attempt to overcome these internal limitations as best as he or she can. With that in mind, what can a comparative study of vicarious liability in tort reveal about the operation of modern tort law and the institutional values it represents?

In a study which encompasses common, civil and hybrid socialist legal systems from Europe, Australia, and China, a number of insights may be gained. The first is one familiar to comparative lawyers. To expect a clear delineation between common and civil law systems is inevitably naïve. The UK and Australian courts display distinct approaches to vicarious liability that indicate clearly that different policy choices are at stake. In contrast, Hong Kong continues to show deference to the position of the UK courts with a particular focus on the domestic

[130] K. Oliphant, 'Cultures of tort law in Europe' (2012) 3 J.E.T.L. 147, 148. See also M. Bussani and M. Infantino, 'Tort Law and Legal Cultures' (2015) 63 Am J Comp L 77, who argue that tort law lives in the shadow of the official system of adjudication and therefore requires insights from anthropology, socio-legal literature, legal history and comparative law to fully understand it.

[131] Oliphant (n 130) 149.

[132] D. Nelken, 'Using the concept of legal culture' (2004) 29 *Australian Journal of Legal Philosophy* 1. See also R. Cotterrell, 'Comparative law and legal culture' in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law* (OUP, 2006); D. Nelken, 'Defining and using the concept of legal culture' in E. Örücü and D. Nelken, *Comparative Law: A Handbook* (Hart, 2007).

[133] G. Frankenberg, *Comparative Law as Critique* (Edward Elgar, 2016) 71. See also G. Frankenberg, 'Critical Comparisons. Rethinking Comparative Law' 26 Harvard I.L.J. 411 (1985) at 413–416. Nelken also concedes that, no attempt to study different legal cultures will be entirely free of particular cultural or value-shaped ideas of what legal order requires: D. Nelken, 'Thinking about legal culture' (2014) 1 *Asian Journal of Law and Society* 255, 259.

concern of ensuring compensation for workers. French law, in contrast, has openly adopted a generous approach based on the theory of *risque-profit*, albeit not accepted by all commentators, with recent proposed reforms to its Civil Code approving generous case-law development of both the relationship and course of employment elements of the doctrine. Chinese law is more difficult to analyse. All commentators have noted since the late 1970s changes to Chinese legal culture and a growing emphasis on law in the population.[134] The Tort Liability Law 2009 marks another step towards a more legalistic framework, but equally, as a hybrid socialist legal system moves towards recognition of vicarious liability, it must be questioned to what extent a market orientated approach is appropriate or even acceptable in this field. Our snapshot of Chinese vicarious liability law in this paper will need further time to develop fully.

What UK, Australian, French and Hong Kong law have in common is that vicarious liability is developing in the context of fully developed market economies in which industrialisation supported by a strong insurance industry has rendered strict liability of employers for the torts of their employees an acceptable means of loss distribution, safeguarding the interests of personal injury victims by ensuring they receive compensation from a solvent defendant. Chinese law is not yet in this position. My study, however, does identify four factors as relevant to the development of vicarious liability across all legal systems: risk, insurance, personal injury, and the role of judges. These will be examined in more detail below.

(i) Risk

In the recent decisions of the UK Supreme Court, enterprise risk-based reasoning has been dominant. UK lawyers now resign themselves to the fact that extensions to vicarious liability can be easily justified by reference to such reasoning or by the even looser term of "social justice".[135] It is of interest that the reaction of the High Court of Australia has been one of caution, rejecting the approach of the UK Supreme Court on the basis that it represents an invitation to formulate policy rather than to search for principle. In particular, the High Court of Australia has stated that "the risk-allocation … theory is based largely on considerations of policy, in particular that an employer should be liable for a risk that its business enterprise has created or enhanced. Such policy considerations have found no real support in Australia."[136] As Lord Phillips indicated in *CCWS,*[137] while the UK courts have yet to regard enterprise risk as the sole justification for vicarious liability, it is a powerful force, notably in relation to cases involving serious intentional torts such as sexual abuse. Equally while the courts in Hong Kong seem to have adopted the UK language of "risk", concerns have been raised that the courts are being unduly generous and that this is not necessarily a transplant which works readily in Hong Kong. In France, however, the recent proposed reforms to the French Civil Code are happy to incorporate notions of *risque-profit* into the Code itself. In terms of social justice, strict liability for the torts of others is justified in terms of risk-based reasoning and the question, then, is to provide a codified formula which will guide future courts. While risk-based reasoning seems

[134] M. Siems, C*omparative Law* (2nd ed., CUP, 2018) 81.
[135] See Lord Toulson in *Mohamud v Morrisons* [2016] UKSC 11 at [45], traced back to Holt CJ in *Boson v Sandford* (1691) 2 Salk 440.
[136] Prince Alfred College v ADC [2016] HCA 37 at [59].
[137] *CCWS* (n 31), [35] (Lord Phillips).

to resonate in systems dominated by market economy concerns, it is of interest that the Australian courts continue to hold out against the force of this argument.

(ii) Insurance

The above picture, however, is meaningless unless we factor in the existence of insurance. Borghetti, for example, has highlighted the importance of widespread insurance (and acceptance of the need to insure) in encouraging the courts to extend French tort law to achieve its goal of victim compensation via loss spreading.[138] Bell has noted the link between tortious liability and insurance in European legal development.[139] By the 1930s, he observes an expansion of employers' liability which he attributes to the capacity of a strong manufacturing sector to absorb losses and pass them onto customers combined with the now general availability of liability insurance (which had not been the case in the nineteenth century). The introduction of compulsory insurance in the twentieth century, for example for drivers and employers, has also created a framework within which private law can develop, confident that judgment may be met by an insured defendant. Private insurance is, however, a feature of a market economy and it might be questioned to what extent such an insurance culture is developing in China. It is also not decisive. Insurance mechanisms exist in Australia and yet vicarious liability remains curtailed. The bitter experience of Australia following the insurance crisis of 2000 which led to the statutory reform to limit tortious liability[140] illustrates the fact that insurance comes at a price and this might not be a price the State is prepared to pay.

(iii) Personal injury

In many of the cases examined above, the concern of the court has been to ensure that personal injury victims obtain compensation. In the UK case-law, vicarious liability was extended in cases such as *Lister* in circumstances where the victims of sexual abuse would have found it otherwise difficult to obtain compensation against an abusive employee long since dismissed. In France the proposed reforms to the Civil Code also place a special premium on the needs of personal injury victims. They are vulnerable, in need of assistance, and when this is combined with tortious behaviour, then the question arises why is the law of tort not providing compensation? Again, policy comes into play here. While the principles of corrective justice have no problem in holding a tortfeasor liable for personal injuries caused to the victim by his or her wrongful conduct, they do indicate that holding a body which has committed no fault responsible in the law of torts needs to be justified. This raises the key question: to what extent can (and should) a mere link between the tortfeasor and the employer be sufficient to justify liability? What we see is consistency across legal systems that personal injury is a serious concern in the law of torts, but it does not alone justify targeting the deeper pockets of the employer to ensure victim compensation. It is noticeable that the key cases discussed above

[138] (n 101).

[139] J. Bell, 'Convergence and divergence in the development of fault liability' in J. Bell and D. Ibbetson (ed), *European Legal Development: The Case of Tort* (CUP, 2014) 174-176. See also G. Edward White, 'The Emergence and Doctrinal Development of Tort Law, 1870-1930' 11 U. St. Thomas L.J. 463 (2014). See also J. Morgan, 'Tort, insurance and incoherence' (2004) 67 M.L.R. 384 on the impact of liability insurance on the common law tradition and A. Tunc in relation to French law: "Les problèmes de responsabilité civile ne doivent pourtant plus etre envisagés comme s'ils se posaient entre deux individus. La plupart du temps, aujourd' hui, l'assurance en transforme les données": D. 1975.86. See also C. van Dam, *European Tort Law* (2nd ed., OUP, 2013) 711-3: The role of insurance.

[140] See above.

do all involve serious personal injuries. At the very least the existence of personal injury seems to trigger the question: *should* vicarious liability apply here?

(iv) The role of judges

Finally, in isolating factors affecting the decisions of the courts, one key developmental element has been the willingness of judges to intervene in a manner they deem consistent with the societal values of the jurisdiction in question. Here, the common law style of reasoning, in which judges set out their reasoning in their judgments, renders analysis more straightforward compared to the very different styles of civil law judgments which, in France, at least, are terse, often consisting of one or two sentences.[141] It also goes without saying that the nature of judgments in China differs again,[142] complicated by the fact that they have traditionally not been published as a matter of course, although Liu and Ren note China's ongoing judicial reforms are aiming to (inter alia) improve the creditability and accessibility of court judgments.[143] Common law judges, therefore, openly engage in policy debate, particularly at the higher level. Lord Phillips, for example, in *CCWS* sets out five policy reasons which influence the courts in determining cases on vicarious liability. Yet again we must not jump to conclusions. The French courts, despite their short judgments, have developed ideas of risk to justify a large extension of strict liability under art. 1242 of the French Civil Code. In contrast, the High Court of Australia in *Prince Alfred College* refused to engage with a discussion of policy, focussing instead on principle. The Hong Kong courts have borrowed dicta from the UK courts, but without a detailed discussion of the policies involved (and have been criticised by commentators for exactly this reason). What is clear, nevertheless, is that the framework for vicarious liability leaves much to the discretion of the courts in how they interpret the breadth and content of the tests stated. This is regardless of legal tradition and of any codified formula. This raises real questions as to the relationship between the courts and the State in terms of the determination of social policy. Where there is a separation of powers between judiciary and State, to what extent are we content to allow the courts to formulate policies which, in their view, benefit society as a whole? This is particularly problematic where there is no public consensus – the extent to which vicarious liability should be imposed on innocent employers being a good example – and, in such circumstances, the courts must face the critical analysis of the legal community as a whole. It is unsurprising in this light that the application of vicarious liability will vary from jurisdiction to jurisdiction.

6. Conclusions

This paper has set out the approach to vicarious liability in tort across a number of different legal systems. Its scope has been wide: common and civil law; Europe/Australia/China; Western and socialist legal systems. Nevertheless, it has identified a common framework for analysis. This is not to be confused, however, with a common application of the rules. Here, a comparative approach to legal analysis forces us to look beyond the legal framework and

[141] B.S. Markesinis, 'A Matter of Style' (1994) 110 L.Q.R. 607; B. Rudden, 'Courts and codes in England, France and Soviet Russia' Tulane L Rev 48 (1974) 1010: P.G. Stein, 'Judge and jurist in the civil law' Louisiana Law Rev 46 (1985) 241, M. Arden, 'Judgment writing: are shorter judgments achievable?' (2012) 128 L.Q.R. 515-520.

[142] See Y. Bu, 'Tort: Overview' in Y. Bu (ed), *Chinese Civil Law* (Hart, 2013) 120-122.

[143] Q. Liu and X. Ren, 'CISG in Chinese Courts: The Issue of Applicability' (2018) 65 Am J Comp L 873, who argue that the newly established "China Judgments Online" website is expected to further improve their accessibility.

recognise differences predicated on different attitudes towards tortious liability, influenced by socio-economic values expressed by the judiciary/State. To learn from the experiences of others, we must first understand and appreciate the significance of broader meta-legal concerns such as insurance provision, attitudes to risk, the style of judicial reasoning, and the importance of compensation as a goal, notably in relation to personal injury claims, which underlie our legal experience. This, indeed, is the value of a comparative study of vicarious liability which takes us beyond substantive law to an examination (and hopefully understanding) of the reasoning and policy choices adopted by the courts and State which underlie our modern law of torts.